92-945

NO.

Supreme Court, U.S.
FILED
DEC 3 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of The United States

OCTOBER TERM, 1992

NORTHWEST AIRLINES, INC.,
Petitioner

v.

AMERICAN AIRLINES AND
AMR CORPORATION,
Respondents

**Petition For Writ Of Certiorari To
The United States Court Of Appeals
For The Fifth Circuit**

PETITION FOR WRIT OF CERTIORARI

CHARLES ALAN WRIGHT
Counsel of Record
727 East 26th Street
Austin, Texas 78705
(512) 471-7188

HARRY M. REASONER
JOHN L. MURCHISON, JR.
MARGARET C. LING
EDWARD A. CARR
Vinson & Elkins L.L.P.
1001 Fannin Street
Suite 2500
Houston, Texas 77002-6760
(713) 758-2358

CHARLES W. WOLFRAM
Cornell Law School
106 Myron Taylor Hall
Ithaca, New York 14853
(607) 255-9668

JOHN F. SUTTON, JR.
P.O. Box 49700
Austin, Texas 78765
(512) 471-3293

W. JAMES KRONZER
1900 Memorial Drive
Houston, Texas 77007
(713) 862-5821

Counsel for Petitioner

QUESTIONS PRESENTED

I. Whether mandamus jurisdiction is available to review a district court order denying a motion to disqualify counsel in a civil action in the absence of (1) a showing of a clear abuse of discretion or usurpation of judicial power, (2) a showing that the parties seeking mandamus lacked adequate alternative means to obtain the relief they seek, and (3) a showing that the right to issuance of the writ is clear and indisputable?

II. Whether a court of appeals may determine whether mandamus should issue by examining the disqualification issue, including underlying factual findings, de novo?

III. Whether the substantial-relationship standard for determining attorney disqualification in federal courts encompasses a duty of loyalty to former clients beyond the preservation of client confidences?

PARTIES

Petitioner is Northwest Airlines, Inc.[1] Petitioner is a plaintiff in the underlying antitrust litigation now pending in the United States District Court for the Southern District of Texas, Galveston Division, and was a respondent in the Fifth Circuit mandamus proceeding from which this petition for writ of certiorari arises.

Respondents are American Airlines, Inc. and AMR Corporation. Respondents are defendants in the underlying antitrust litigation now pending in the United States District Court for the Southern District of Texas, Galveston Division, and were the petitioners in the Fifth Circuit mandamus proceeding.

The Honorable Samuel B. Kent, Judge of the United States District Court for the Southern District of Texas, Galveston Division, is the Judge before whom the underlying antitrust litigation is now pending and was also a respondent in the Fifth Circuit mandamus proceeding pursuant to Rule 21 of the Federal Rules of Appellate Procedure, although his name was not listed as a respondent in the caption in that proceeding pursuant to Fifth Circuit Local Rule 21. Judge Kent was represented pro forma in the Fifth Circuit mandamus proceeding by counsel for the party

---

[1] Northwest Airlines, Inc. is a wholly-owned subsidiary of NWA, Inc., which in turn is a wholly-owned subsidiary of Wings Holdings, Inc. Northwest Airlines, Inc. has no nonwholly-owned subsidiaries.

opposing the mandamus, Northwest Airlines, Inc., petitioner in this Court.

TABLE OF CONTENTS

QUESTIONS PRESENTED i
PARTIES ii
TABLE OF CONTENTS iv
TABLE OF AUTHORITIES v
OPINIONS AND ORDERS DELIVERED BELOW 2
JURISDICTION OF THIS COURT 2
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 3
STATEMENT OF THE CASE 3
REASONS FOR GRANTING THE WRIT 5

I. In Conflict With Decisions Of This Court And Other Circuits, The Fifth Circuit's Exercise Of Mandamus Jurisdiction In This Case Expands The Availability Of Mandamus Review Of Attorney-Disqualification Motions 7

II. In Conflict With Decisions Of This Court, Of Other Circuits, And Of Other Panels Of Its Own Circuit, The Fifth Circuit Improperly Engaged In A De Novo Review Of The Factual Findings Of The District Court 15

III. The Fifth Circuit's Decision Creates A New And Unworkable Duty Of Loyalty To Former Clients As The Federal Standard For Disqualification In Former-Client Cases, In Conflict With Established Norms Governing Former-Client Conflicts In The Federal Courts 22

CONCLUSION 28

TABLE OF AUTHORITIES

Cases

Ah Ju Steel Co., Ltd. v. Armco, Inc., 680 F.2d 751 (C.C.P.A. 1982) 26

Allied Chem. Corp. v. Daiflon, Inc., 449 U.S. 33 (1980) 8,10,15

Amadeo v. Zant, 486 U.S. 214 (1988) 20

In re American Airlines v. Northwest Airlines, Inc., 972 F.2d 605 (5th Cir. 1992) 2

In re American Cable Publications, Inc., 768 F.2d 1194 (10th Cir. 1985) 13,21

American Protection Ins. Co. v. MGM Grand Hotel-Las Vegas, Inc., 765 F.2d 925 (9th Cir. 1985) 13

Anderson v. City of Bessemer City, 470 U.S. 564 (1985) 19

Armstrong v. McAlpin, 625 F.2d 433 (2d Cir. 1980), *vacated*, 449 U.S. 1106 (1981) 25

In re Asbestos Cases, 514 F. Supp. 914 (E.D. Va. 1981) 26

Bankers Life & Casualty Co. v. Holland, 346 U.S. 379 (1953) 10

Board of Educ. v. Nyquist, 590 F.2d 1241 (2d Cir. 1979) 25

In re Bushkin Assocs., 864 F.2d 241 (1st Cir. 1989) 10,13,21

Chambers v. Superior Court, 175 Cal. Rptr. 575 (Cal. Ct. App. 1981) 26

Christensen v. United States Dist. Court, 844 F.2d 694 (9th Cir. 1988) 13

Cinema 5, Ltd. v. Cinerama, Inc., 528 F.2d 1384 (2d Cir. 1976) 23

Collins v. Amoco Prod. Co., 706 F.2d 1114 (11th Cir. 1983) 14

C.P.C. Partnership v. Nosco Plastics, Inc., 719 F.2d 400 (Fed. Cir. 1983) 12

In re Dresser Indus., Inc, 972 F.2d 540 (5th Cir. 1992) 10,16

Duncan v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 646 F.2d 1020 (5th Cir. Unit B), *cert. denied*, 454 U.S. 895 (1981) . . . . . *passim*

English v. Local Union No. 46, 654 F.2d 473 (7th Cir. 1981) 16

Fiandaca v. Cunningham, 827 F.2d 825 (1st Cir. 1987) 26

In re Finkelstein, 901 F.2d 1560 (11th Cir. 1991) 21

Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368 (1981) . . . . . *passim*

Flanagan v. United States, 465 U.S. 259 (1984) 11

In re Ford Motor Co., 751 F.2d 274 (8th Cir. 1984) 12

Gas-A-Tron v. Union Oil Co., 534 F.2d 1322 (9th Cir.), *cert. denied*, 429 U.S. 861 (1976) 16

In re Gopman, 531 F.2d 262 (5th Cir. 1976) 16

Grahams Serv. Inc. v. Teamsters Local 975, 700 F.2d 420 (8th Cir. 1982) 16

Icicle Seafoods, Inc. v. Worthington, 475 U.S. 709 (1986) 20

Johnston v. Harris County Flood Control Dist., 869 F.2d 1565 (5th Cir. 1989) 16

Kevlik v. Goldstein, 724 F.2d 844 (1st Cir. 1984) 16

Kitchen v. Arntech Chemical, 769 F. Supp. 254 (S.D. Ohio 1991) 26

Koller v. Richardson-Merrell, 737 F.2d 1038 (D.C. Cir. 1984), *vacated*, 472 U.S. 424 (1985) . . . . . *passim*

In re Korea Shipping Co., 621 F. Supp. 164 (D. Alaska 1985) 26

Kreda v. Rush, 550 F.2d 888 (3d Cir. 1977) 16

La Buy v. Howes Leather Co., 352 U.S. 249 (1956) 9

Laker Airway Ltd. v. Pan American World Airways, 103 F.R.D. 22 (D.D.C. 1984) 23,25

Lunde v. Helms, 898 F.2d 1343 (8th Cir.), *cert. denied*, 111 S. Ct. 249 (1990) 12

Mallard v. United States Dist. Court, 490 U.S. 296 (1989) 8,9,15

Meat Price Investigators Ass'n v. Iowa Beef Processors, Inc., 448 F. Supp. 1 (S.D. Iowa 1977), *aff'd*, 572 F.2d 163 (8th Cir. 1978) 26

In re Mechem, 880 F.2d 872 (6th Cir. 1989) 10,13,21

Merle Norman Cosmetics, Inc. v. United States Dist. Court, 856 F.2d 98 (9th Cir. 1988) 10,12,13

Platt v. Minnesota Mining & Mfg. Co., 376 U.S. 240 (1964) 19

Professional Servs. Indus. v. Kimbrell, 758 F. Supp. 676 (D. Kan. 1991) 26

Pullman-Standard, Div. of Pullman, Inc. v. Swint, 456 U.S. 273 (1982) 20

Reese v. Georgia Power Co., 381 S.E.2d 110 (Ga. Ct. App. 1989) 26

Richardson-Merrell, Inc. v. Koller, 472 U.S. 424 (1985) . . . . . *passim*

Schlagenhauf v. Holder, 379 U.S. 104 (1964) 8,9

In re Snyder, 472 U.S. 634 (1985) 22

T.C. Theatre Corp. v. Warner Bros. Pictures, 113 F. Supp. 265 (S.D.N.Y. 1953) 23

Unified Sewerage Agency v. Jelco, Inc., 646 F.2d 1339 (9th Cir. 1981) 12,13

United States v. Miller, 624 F.2d 1198 (3d Cir. 1980) 22

University Patents, Inc. v. Kligman, 737 F. Supp. 325 (E.D. Pa. 1990) 26

Uniweld Prods., Inc. v. Union Carbide Corp., 385 F.2d 992 (5th Cir. 1967), *cert denied*, 390 U.S. 921 (1968) 17

W.T. Grant Co. v. Haines, 531 F.2d 671 (2d Cir. 1976) 16,25

Wilson P. Abraham Constr. Corp. v. Armco Steel Corp., 559 F.2d 249 (5th Cir. 1977) 17,21

Woods v. Covington County Bank, 537 F.2d 804 (5th Cir. 1976) 16,26

Statutes and Rules

Fed. R. App. P. 35(b) 2
Fed. R. Civ. P. 52(a) 19,20
28 U.S.C. § 1254(1) (1988) 2
28 U.S.C. § 1291 (1988) 7,11
28 U.S.C. § 1292(b) (1988) 7
28 U.S.C. § 1337 (1988) 3
28 U.S.C. § 1651 (1988) 4,12
28 U.S.C. § 1651(a) (1988) 3

Other Authorities

15B CHARLES A. WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE & PROCEDURE: JURISDICTION § 3914.21 (2d ed. 1992) 14

RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 213 (Tent. Draft No. 4, 1991) 24

CHARLES W. WOLFRAM, MODERN LEGAL ETHICS (1986) 23,24,25

NO.

IN THE

Supreme Court of The United States

OCTOBER TERM, 1992

NORTHWEST AIRLINES, INC.,
Petitioner

v.

AMERICAN AIRLINES AND
AMR CORPORATION,
Respondents

**Petition For Writ Of Certiorari To
The United States Court Of Appeals
For The Fifth Circuit**

PETITION FOR WRIT OF CERTIORARI

Petitioner Northwest Airlines, Inc. (Northwest) respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Fifth Circuit, dated September 4, 1992. The Fifth Circuit issued a writ of mandamus directing the United States District Court for the Southern District of Texas to vacate its order denying the motion filed by American Airlines, Inc. (American) to disqualify the law firm of Vinson & Elkins L.L.P. (Vinson & Elkins) from representing Northwest, and directing the district court to disqualify Vinson & Elkins from representing Northwest in this case on the ground that Vinson & Elkins's represen-

tation of Northwest in this case is substantially related to Vinson & Elkins's prior representation of American in certain concluded matters.

OPINIONS AND ORDERS DELIVERED BELOW

The opinion of the Fifth Circuit Court of Appeals granting the writ of mandamus is reported at 972 F.2d 605 (5th Cir. 1992), and is reprinted as Appendix A hereto.

The order of the United States District Court for the Southern District of Texas denying American's motion to disqualify Vinson & Elkins from representing Northwest is not reported and is reprinted as Appendix B hereto.

The order of the Fifth Circuit Court of Appeals denying Northwest's suggestion for rehearing en banc is not reported and is reprinted as Appendix C hereto.

JURISDICTION OF THIS COURT

This petition for a writ of certiorari seeks review of the September 4, 1992 decision of the Fifth Circuit Court of Appeals, which granted a writ of mandamus directing the district court to disqualify Vinson & Elkins from representing Northwest in this case.

Pursuant to Rule 35(b) of the Federal Rules of Appellate Procedure, petitioner Northwest filed a timely suggestion for rehearing en banc in the Fifth Circuit, which the Fifth Circuit denied on September 29, 1992. Petitioner did not file a petition for panel rehearing in the Fifth Circuit.

Jurisdiction of this Court to review the decision of the United States Court of Appeals for the Fifth Circuit is invoked under 28 U.S.C. § 1254(1) (1988).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

All Writs Act, 28 U.S.C. § 1651(a) (1988):

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

STATEMENT OF THE CASE

This mandamus dispute arises out of an antitrust action brought by Northwest against American on June 12, 1992, in the United States District Court for the Southern District of Texas. That court's jurisdiction was invoked under 28 U.S.C. § 1337 (1988). The district court consolidated this action with a suit brought a few days earlier by Continental Airlines against American.[1]

On July 1, 1992, American filed a motion to disqualify Vinson & Elkins from representing Northwest on the grounds that (1) Vinson & Elkins had already accepted representation of American in the previously filed Continental action, and (2) Vinson & Elkins's former representation of American in certain concluded matters disqualified Vinson & Elkins from representing Northwest in this lawsuit. Northwest moved to disqualify Weil, Gotshal & Manges because of its possession of confidential information from a prior representation. No party requested a hearing. The case was before the trial court on voluminous affidavits and appended documents creating sharply disputed factual issues. On July 24, 1992, the district court, after exhaustive review, denied both American's motion to disqualify

---

[1] Continental Airlines was not a party to the Fifth Circuit mandamus proceeding.

Vinson & Elkins and Northwest's motion to disqualify Weil, Gotshal & Manges and issued a succinct written opinion with broad fact findings. App. B at B-1 to B-6. In ruling on these motions, the district court applied the traditional substantial-relationship test required by well-settled Fifth Circuit and Texas authority. *Id.* at B-2 to B-3, B-4 n.2. No party asked for further findings of fact. American then filed its petition for writ of mandamus in the United States Court of Appeals for the Fifth Circuit, invoking that court's jurisdiction under 28 U.S.C. § 1651 (1988).

On September 4, 1992, the Fifth Circuit held that the district court erred in denying American's motion to disqualify Vinson & Elkins. App. A at A-1. The Fifth Circuit issued a writ of mandamus directing the district court to vacate its order denying American's motion and to enter an order disqualifying Vinson & Elkins from representing Northwest. *Id.* at A-56. With respect to American's claim that Vinson & Elkins had already agreed to represent American in the Continental suit, the Fifth Circuit recognized the factual controversy on "switching sides" but found remand for further findings of fact on this point unnecessary because it held that Vinson & Elkins should be disqualified on other grounds. *Id.* at A-13 to A-18. In overturning the trial court's finding that Vinson & Elkins's representation of Northwest was not substantially related to its prior representation of American, the Fifth Circuit made de novo fact findings and created a new duty of loyalty to former clients. *Id.* at A-37 to A-56.

Since the Fifth Circuit's ruling, the litigation has proceeded in the district court, and Vinson & Elkins has taken no part in the case. Should this Court grant certiorari and reverse the Fifth Circuit,

Northwest would have the option of having Vinson & Elkins represent it again in this lawsuit.

REASONS FOR GRANTING THE WRIT

Unless this Court exercises its certiorari jurisdiction to reverse the Fifth Circuit, this decision will distort two important bodies of law: the rules on mandamus jurisdiction and the substantive standards applicable to former-client conflict cases in federal courts. The Fifth Circuit's review of this disqualification case on mandamus expands the availability of mandamus jurisdiction far beyond the limits established by this Court. The decision ignores the absence of factors justifying the exercise of mandamus jurisdiction and eliminates any principled basis for limiting piecemeal appellate review of trial court disqualification orders. The same exigencies of judicial administration that led this Court to eliminate the availability of immediate appeals of disqualification orders through the use of the *Cohen* "collateral order" exception to the final judgment rule justify this Court's exercise of its certiorari jurisdiction in this case to limit the use of mandamus jurisdiction in attorney-disqualification cases.

Moreover, the standard of review applied by the Fifth Circuit in this case conflicts with the established standard of review in mandamus jurisdiction. The standard for issuance of mandamus laid down by this Court, followed by decisions in other circuits and previously followed in the Fifth Circuit, requires a clear abuse of discretion or a usurpation of judicial power. In conducting its mandamus review, the Fifth Circuit accorded no deference to the findings of the district court but instead engaged in an extensive and unprecedented de novo review of the facts. Indeed, the panel

engaged in a broader fact finding than would have been proper if the case had been before the court on direct appeal.

Finally, the Fifth Circuit's decision creates a new test for attorney disqualification to be applied in federal courts: a "duty of loyalty" to former clients entirely unrelated to the protection of client confidences. This is an ambiguous and unworkable standard that conflicts with decisions in other circuits and that rejects established norms in former-client conflicts analysis. The ethical standard governing attorneys in federal proceedings is a matter of federal law. The standard to be applied by federal courts in determining former-client conflicts is an important question that has not been, but should be, addressed by this Court. The Fifth Circuit's decision in this case will create great uncertainty about attorney disqualification, unduly narrow the freedom of clients to hire lawyers of their choice, encourage the use of disqualification motions as a tactical device, and allow multibillion dollar corporations to conflict out law firms from representing an adverse party in future litigation by periodically doling out relatively small amounts of work to these firms.

Unless reversed by this Court, the Fifth Circuit's decision will open the floodgates to piecemeal appellate review of nonappealable trial-court disqualification orders, authorize appellate courts to make de novo fact findings while ignoring district courts' discretion in ruling on disqualification motions, and serve to deprive a party of its chosen counsel in litigation. Those serious consequences are compelling reasons for this Court to exercise its certiorari jurisdiction.

I. In Conflict With Decisions Of This Court And Other Circuits, The Fifth Circuit's Exercise Of Mandamus Jurisdiction In This Case Expands The Availability Of Mandamus Review Of Attorney-Disqualification Motions.

In *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368 (1981), this Court held that district-court orders denying a motion to disqualify are not immediately appealable as a collateral order under 28 U.S.C. § 1291:

> The propriety of the district court's denial of a disqualification motion will often be difficult to assess until its impact on the underlying litigation may be evaluated, which is normally only after final judgment. The decision whether to disqualify an attorney ordinarily turns on the particular factual situation of the case then at hand, and the order embodying such a decision will rarely, if ever, represent a final rejection of a claim of fundamental right that cannot effectively be reviewed following judgment on the merits. . . . [S]hould the Court of Appeals conclude after the trial has ended that permitting continuing representation was prejudicial error, it would retain its usual authority to vacate the judgment appealed from and order a new trial. That remedy seems plainly adequate should petitioner's concerns of possible injury prove ultimately well founded.

Id. at 377-78. *Firestone* left open the possibility that review of a trial court order denying a disqualification motion might be available pursuant to 28 U.S.C. § 1292(b) or through the writ of mandamus if the party seeking review could demonstrate that it would be irreparably injured if forced to await final judgment. *Id.* at 378 n.13; *see also Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 435 (1985) (leaving open the same question in the context of a trial court order *granting* a disqualification motion). This Court cautioned, however, that

mandamus review of disqualification orders would be available, if at all, only "in the exceptional circumstances for which [the writ of mandamus] was designed." *Firestone*, 449 U.S. at 378 n.13; *see also Richardson-Merrell*, 472 U.S. at 435. Because the petitioner in *Firestone* "made no colorable claim that the harm it might suffer if forced to await the final outcome of the litigation before appealing the denial of its disqualification motion is any greater than the harm suffered by any litigant forced to wait until the termination of trial before challenging interlocutory orders it considers erroneous," this Court did not reach the issue of whether and to what extent a § 1292(b) appeal or the extraordinary remedy of mandamus might be available to challenge disqualification motions before final judgment. *Firestone*, 449 U.S. at 378 n.13.

The standards to be employed in determining whether mandamus review is available are well settled. "[T]he remedy of mandamus is a drastic one, to be invoked only in extraordinary situations." *Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 34 (1980) (per curiam). Mandamus proceedings are not a substitute for appeal. *See Schlagenhauf v. Holder*, 379 U.S. 104, 110 (1964). This Court has recognized that the writ of mandamus has traditionally been used in the federal courts only to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so. *Mallard v. United States Dist. Court*, 490 U.S. 296, 308 (1989); *Daiflon*, 449 U.S. at 34. To ensure that mandamus remains an extraordinary remedy, petitioners must demonstrate that they lack adequate alternative means to obtain the relief they seek, and carry the burden of showing that their right to

issuance of the writ is clear and indisputable. *Mallard*, 490 U.S. at 309.

Despite the Fifth Circuit's allusion to the limited availability of mandamus review, App. A at A-4 to A-7, its opinion effectively ignores the demanding procedural requirements for mandamus set by this Court. First, the court concluded, without any analysis, that American has no adequate alternative means to obtain the relief sought on the grounds that "the nature and size of this litigation would *seem* to preclude effective review upon final judgment." *Id.* at A-6 (emphasis added). This rationale provides no basis for granting mandamus, because it does not demonstrate how the harm American would suffer from awaiting final judgment would be greater than that of any other litigant forced to await final judgment before challenging an interlocutory order. *See Firestone*, 449 U.S. at 378-79 and n.13. Indeed, according to the Fifth Circuit's rationale, mandamus review of virtually all interlocutory rulings in this case and in other cases of similar "nature and size" would be justified.

Second, the Fifth Circuit justified mandamus on the ground that this case raised important questions pertaining to the proper interpretation and application of ethical standards in disqualification cases. App. A at A-6. This Court has indicated that mandamus may be warranted when a case presents an important and novel issue of first impression, and the standards for mandamus are otherwise met. *Schlagenhauf*, 379 U.S. at 110-11; *La Buy v. Howes Leather Co.*, 352 U.S. 249, 257 (1956). But this case presented no novel issues of first impression; rather, the district court simply examined the disputed facts and made its determination using well-settled Fifth Circuit precedents. App. B at B-4 n.2. The Fifth Circuit's grant of mandamus

in this case extends the limits of mandamus jurisdiction established by this Court and conflicts with decisions in other circuits. *See, e.g., In re Bushkin Assocs.*, 864 F.2d 241, 247 (1st Cir. 1989) (denying a petition for mandamus review of an order granting disqualification because, *inter alia*, the case did not present a novel legal question); *Merle Norman Cosmetics, Inc. v. United States Dist. Court*, 856 F.2d 98, 101 (9th Cir. 1988) (denying a petition for mandamus to review the denial of a disqualification motion because, *inter alia*, "[t]he substantial relationship issue is not a novel one in this circuit," and thus the issue raised was not a new or important one). As this Court has recognized, "If we applied the reasoning advanced by the [Fifth Circuit], then every interlocutory order which is wrong might be reviewed under the All Writs Act." *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379, 382-83 (1953).[2]

---

[2] In support of its position, the Fifth Circuit relied on its recent opinion in *In re Dresser Indus., Inc*, 972 F.2d 540 (5th Cir. 1992). App. A at A-4 to A-6. *Dresser* provides no basis for granting mandamus in this case. Because *Dresser* involved novel issues and undisputed facts, the court of appeals could easily determine if the party seeking mandamus had a clear and indisputable right to the relief sought. *Compare Dresser*, 972 F.2d at 543 (issuing mandamus to review a district court disqualification ruling made on undisputed facts) *with In re Mechem*, 880 F.2d 872, 873-75 (6th Cir. 1989) (observing that mandamus is not an appropriate vehicle to review a district court's disqualification order when the order turned on the particular facts of the case) *and Daiflon*, 449 U.S. at 35-36 (noting that when a matter is committed to the district court's discretion, it cannot be said that a litigant's right to a particular result is clear and indisputable). In this case, the facts were sharply disputed, and the district court neither addressed nor pronounced any new rules of law. In short, the Fifth Circuit's opinion in *Dresser* provides no support for the proposition that this attorney-disqualification case falls within the narrow class of exceptional cases warranting the exercise of mandamus jurisdiction.

In *Firestone*, *Richardson-Merrell*, and *Flanagan*,[3] this Court established beyond doubt that interlocutory review of orders on attorney-disqualification motions is almost never appropriate. As this Court has recognized, "the *district judge* has primary responsibility to police the prejudgment tactics of litigants, and [ ] the district judge can better exercise that responsibility if the appellate courts do not repeatedly intervene to second-guess prejudgment rulings." *Richardson-Merrell*, 472 U.S. at 436 (emphasis in original). Moreover, the clear import of the Court's teaching on mandamus is that its use must be confined to the "extraordinary circumstances" for which the writ was designed. In this case, those "extraordinary circumstances" simply do not exist, and the Fifth Circuit made no attempt to demonstrate them, beyond invoking (without further elaboration) the "nature and size" of the litigation. App. A at A-6. By granting mandamus in this case, the Fifth Circuit undercut *Firestone*, *Richardson-Merrell*, and *Flanagan*, and opened the door to interlocutory review of orders on attorney-disqualification motions virtually on demand. Indeed, if mandamus is appropriate in this case, it is difficult to see why it would not be appropriate in any case in which a district court has granted or denied a disqualification motion.

Since this Court's decision in *Firestone*, the Fifth Circuit is the only circuit that has granted mandamus and reversed a district court's denial of a disqualification motion. Although the Eighth and Ninth Circuits have also addressed the availability of mandamus to review

---

[3] *Flanagan v. United States*, 465 U.S. 259, 269 (1984) (holding that district court orders granting a motion to disqualify counsel in criminal cases are not collateral orders immediately appealable under 28 U.S.C. § 1291).

trial court orders denying disqualification of counsel, neither circuit has granted the writ.[4] *See Lunde v. Helms*, 898 F.2d 1343 (8th Cir.), *cert. denied*, 111 S. Ct. 249 (1990); *Merle Norman Cosmetics, Inc. v. United States Dist. Court*, 856 F.2d 98 (9th Cir. 1988); *In re Ford Motor Co.*, 751 F.2d 274 (8th Cir. 1984); *Unified Sewerage Agency v. Jelco, Inc.*, 646 F.2d 1339 (9th Cir. 1981).

In *Ford Motor*, the Eighth Circuit observed that the "[d]enial of a motion to disqualify will rarely justify the issuance of a writ of mandamus," and refused to issue the writ, holding that the petitioner had an adequate alternative remedy by appeal after final judgment. 751 F.2d at 275-76. In *Lunde*, the Eighth Circuit treated an appeal of a disqualification order as a petition for mandamus and summarily denied the petition on the grounds that there were no "extraordinary circumstances" justifying the writ. 898 F.2d at 1345.

The Ninth Circuit, in *Merle Norman Cosmetics*, denied the petition for mandamus to review the denial of a motion to disqualify because, *inter alia*, "the substantial relationship issue is not a novel one in this circuit," and the district court did not clearly err as a matter of law. 856 F.2d at 100-02. In *Jelco*, the Ninth Circuit treated an appeal as a petition for mandamus and upheld the trial court's denial of disqualification, finding that the court had not abused its discretion. 646 F.2d at 1351.

---

[4] In *C.P.C. Partnership v. Nosco Plastics, Inc.*, 719 F.2d 400 (Fed. Cir. 1983), involving an appeal from an order refusing to disqualify counsel, the Federal Circuit concluded it had no general authority to issue a writ of mandamus and that 28 U.S.C. § 1651 provided no basis to issue the writ in that case. *Id.* at 401.

While clearly wrong, the decision of the Fifth Circuit in this case is symptomatic of the increasingly confused and internally contradictory decisions in other circuits on the standard that should be employed to determine the availability of mandamus to review disqualification orders. For instance, in both *Jelco* and *Merle Norman*, the Ninth Circuit found the petitioner had met the requirement that it have no other adequate means of relief because a trial court order denying a motion to disqualify is no longer appealable under section 1291 or (in the Ninth Circuit) section 1292. *Merle Norman*, 856 F.2d at 101; *Jelco*, 646 F.2d at 1344. In so holding, the Ninth Circuit effectively ignored this Court's warning in *Firestone* that vacating the judgment and ordering a new trial would be a "plainly adequate" remedy in most cases. *Firestone*, 449 U.S. at 377-78.[5]

---

[5] Subsequent to *Richardson-Merrell*, the First, Sixth, Ninth, and Tenth Circuits have addressed the related issue whether and to what extent mandamus is available to review a trial court order *granting* a disqualification motion. *See In re Bushkin Assocs.*, 864 F.2d 241 (1st Cir. 1989); *In re Mechem*, 880 F.2d 872 (6th Cir. 1989); *Christensen v. United States Dist. Court*, 844 F.2d 694 (9th Cir. 1988); *In re American Cable Publications, Inc.*, 768 F.2d 1194 (10th Cir. 1985); *American Protection Ins. Co. v. MGM Grand Hotel-Las Vegas, Inc.*, 765 F.2d 925 (9th Cir. 1985). The courts in these cases have reached conflicting results, and the reasoning underlying the decisions has varied widely. The First Circuit, while refusing to grant the writ on the facts before it, left open the possibility that mandamus may be available under exceptional circumstances. *Bushkin*, 864 F.2d at 247. In *Mechem*, on the other hand, the Sixth Circuit denied the writ and indicated that mandamus is almost never an appropriate vehicle for reviewing trial court disqualification orders. 880 F.2d at 874. The Ninth Circuit in *Christensen* issued the writ of mandamus, finding that there was no adequate alternative remedy, but summarily denied the writ in *MGM*, citing the lack of "extraordinary circumstances." *Christensen*, 844 F.2d at 697; *MGM*, 765 F.2d at 926. In *American Cable*, the Tenth Circuit issued the writ of mandamus in a case involving undisputed facts. 768 F.2d at 1195.

Firestone laid down a bright-line rule: indeed since then any attempt to take an immediate appeal from denial of disqualification is so clearly unfounded that it invites the imposition of sanctions. *Collins v. Amoco Prod. Co.*, 706 F.2d 1114 (11th Cir. 1983). That rule was the product of experience.

> The arguments that significant and irreparable harm can be caused by an erroneous denial of disqualification are forceful. They were overcome in the courts of appeals by actual experience. Experience showed that motions to disqualify were misused as a dilatory tactic, and that the delay imposed by immediate appeal was frequently costly. Although the courts tended to say it obliquely, they also seemed to feel that the prospect of significant prejudice is remote. District courts are not apt to be often wrong in denying motions to disqualify, and such mistakes as occur are not likely to lead to significant changes in the trial process. Even the appearance of impropriety is diluted by the judge's determination that no impropriety is involved.

15B CHARLES A. WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE & PROCEDURE: JURISDICTION § 3914.21, at 94 (2d ed. 1992). The costs that this Court sought to eliminate by its ruling in *Firestone* are no less great when appellate review is sought under the name of mandamus rather than appeal.

The Fifth Circuit's decision to review this case on mandamus, despite the absence of any extraordinary circumstances justifying the exercise of mandamus jurisdiction, conflicts with *Firestone* and with other decisions of this Court limiting mandamus jurisdiction, as well as with the decisions of the Eighth and Ninth Circuits concluding that mandamus does not lie in cases like this one. It invites an application for mandamus whenever a motion to disqualify counsel is denied. In

practical effect, this would wipe out *Firestone* and impose again on the courts of appeals and on litigants the burdens the *Firestone* rule was intended to avoid. This Court should exercise its certiorari jurisdiction to reaffirm *Firestone* and to limit the use of mandamus review in disqualification matters to those cases that present the truly exceptional circumstances for which the writ is intended.

II. In Conflict With Decisions Of This Court, Of Other Circuits, And Of Other Panels Of Its Own Circuit, The Fifth Circuit Improperly Engaged In A De Novo Review Of The Factual Findings Of The District Court.

As this Court has made clear, mandamus will issue only for a clear abuse of discretion or conduct amounting to a usurpation of judicial power. *Daiflon*, 449 U.S. at 35; *Mallard*, 490 U.S. at 309. Moreover, this Court has indicated that where a matter is committed to the trial court's discretion, it cannot be said that a litigant's right to a particular result is clear and undisputable. *Daiflon*, 449 U.S. at 36.

In this case, the Fifth Circuit recognized the inherent difficulty in granting mandamus when the issue in dispute is committed to the discretion of the district court. But the court sidestepped this problem by rejecting the widely accepted rule that attorney disqualification is committed to the sound discretion of the trial court. App. A at A-7. Although the Fifth Circuit stated it would review the district court's "reading" of the relevant ethical standard de novo, App. A at A-7, it in fact treated the substantial-relationship issue as a question of law that it could decide de novo. In so doing, the Fifth Circuit embarked on an unprecedented and insupportable de novo review of facts that were highly disputed in the district court. App. A at A-37 to A-56.

The Fifth Circuit's position that the trial court has no discretion in attorney-disqualification motions conflicts with the First, Second, Third, Seventh, Eighth, and Ninth Circuits, all of which have held that a ruling on attorney disqualification is committed to the sound discretion of the district court. *See, e.g., Kevlik v. Goldstein*, 724 F.2d 844 (1st Cir. 1984); *Grahams Serv. Inc. v. Teamsters Local 975*, 700 F.2d 420 (8th Cir. 1982); *English v. Local Union No. 46*, 654 F.2d 473 (7th Cir. 1981); *Kreda v. Rush*, 550 F.2d 888 (3d Cir. 1977); *Gas-A-Tron v. Union Oil Co.*, 534 F.2d 1322 (9th Cir.), *cert. denied*, 429 U.S. 861 (1976); *W.T. Grant Co. v. Haines*, 531 F.2d 671 (2d Cir. 1976). Even in the Fifth Circuit, the "abuse of discretion" standard of review for trial-court attorney-disqualification orders has been recognized and applied. *See Johnston v. Harris County Flood Control District*, 869 F.2d 1565, 1569-70 (5th Cir. 1989); *In re Gopman*, 531 F.2d 262, 266 (5th Cir. 1976). Only two weeks before the decision below came down another panel of the Fifth Circuit had said: "On appeal, the standard of review for the grant or denial of a motion to disqualify would be for abuse of discretion." *In re Dresser Indus., Inc.*, 972 F.2d 540, 542 n.4 (5th Cir. 1992).

Stricter appellate scrutiny is applied when the facts are undisputed. "In disqualification cases such as this, where the facts are not in dispute, District Courts enjoy no particular functional advantage over appellate courts in their formulation and application of ethical norms." *Woods v. Covington Country Bank*, 537 F.2d 804, 810 (5th Cir. 1976); *Dresser*, 972 F.2d at 543. But that is not this case. Here the

facts were disputed in numerous conflicting affidavits.[6] The factual issues the trial court reviewed in ruling on the disqualification motion -- including the scope of Vinson & Elkins's prior representation of American, the materials to which Vinson & Elkins had access, the documents it reviewed, even the subject matter of the prior lawsuits-- were all hotly contested by the parties. Thus, it is clear that there is no basis, even under Fifth Circuit precedent, for treating this attorney-disqualification case as a question of law.[7]

It is also clear that in the Fifth Circuit the determination whether two matters are substantially related for purposes of attorney disqualification is essentially factual. *See Wilson P. Abraham Constr. Corp. v. Armco Steel Corp.*, 559 F.2d 250, 253 (5th Cir. 1977); *Uniweld Prods., Inc. v. Union Carbide Corp.*, 385 F.2d 992, 995 (5th Cir. 1967), *cert. denied*, 390 U.S. 921 (1968); *see also Duncan v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 646 F.2d 1020, 1029 (5th Cir. Unit B) ("careful comparison" of present and prior representations required), *cert. denied*, 454 U.S. 895 (1981). Here, although the Fifth Circuit purported to review the district court's findings of fact for clear error and its "reading" of the relevant ethical standards de novo, it in fact engaged in a de novo review of the district court's application of the ethical standards to disputed facts, substituting its own fact findings

---

[6] The trial court noted in its order that "the filings, *on the disqualification issue alone*, form a stack approximately 45 inches high and weighing 117 pounds." App. B at B-5 (emphasis in original).

[7] The panel opinion indicates that Northwest "conceded" that abuse of discretion was not the appropriate standard of review. App. A at A-7. To the contrary, Northwest's brief in the Fifth Circuit clearly states its position that mandamus is appropriate only where there is a clear abuse of discretion or usurpation of power by the trial court.

for those of the district court. *See* App. A at A-37 to A-56. Although the district court's findings were not detailed, the court specifically noted in its opinion that it had "carefully examined the dumbfoundingly voluminous pleadings on file" in making these findings. App. B at B-2. In determining the ultimate fact that this lawsuit was not substantially related to the prior matters in which Vinson & Elkins had represented American, the district court necessarily resolved the factual disputes on each of American's grounds for disqualification in favor of Northwest. Nevertheless, the Fifth Circuit, in reviewing the record below, adopted much of American's version of the facts and resolved the ultimate factual issues in favor of American, in direct contradiction to the findings of the district court. Thus, although the district court found, *inter alia*, that

> (1) "there is some evidence that Vinson & Elkins has represented [American] in regard (sic) other, unrelated matters";
>
> (2) "the matters that [Vinson & Elkins] did handle for [American] were only tangentially related to this litigation"; and
>
> (3) "any information actually received by Vinson & Elkins was not sufficient to cause any material prejudice to [American] in this litigation," App. B at B-2, B-3;

the Fifth Circuit instead found, *inter alia*, that:

> (1) two prior Texas cases "involved two particular matters at issue in the present case," App. A at A-39;
>
> (2) "[Vinson & Elkins's] representation of American in the Fort Bend case is substantially related to the present case," App. A at A-43; and

> (3) "given that the two cases sharing this 'subject matter' allege similar antitrust violations, we find [Vinson & Elkins's] representation of American in System One substantially related to its present representation of Northwest," App. A at A-48.

Nowhere in its opinion does the Fifth Circuit state that any fact found by the district court was "clearly erroneous."

In reviewing the disqualification issue de novo, rather than for abuse of discretion, the Fifth Circuit ignored precedent from this Court holding that de novo review is inappropriate on mandamus. *Platt v. Minnesota Mining & Mfg. Co.*, 376 U.S. 240, 245 (1964) (reversing the Seventh Circuit in a criminal case on the grounds that in granting mandamus, the court "undertook a de novo review of the record and itself exercised the discretionary function which the [criminal venue] rule commits to the trial judge."). Indeed, the panel engaged in a broader fact finding than would have been proper if the case had been before it on direct appeal. Even on direct appeal, de novo review of the district court's factual findings is improper. Fed. R. Civ. P. 52(a); *see Anderson v. City of Bessemer City*, 470 U.S. 564, 573-74 (1985) (making clear that trial court factual determinations made on the basis of conflicting documentary evidence are entitled to the same deference by appellate courts as those made after testimony in open court). Moreover, as this Court has emphasized, even under the "clearly erroneous" standard of Rule 52(a), the court of appeals' review is deferential, and "if the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as a trier of fact, it would have

weighed the evidence differently." *Amadeo v. Zant*, 486 U.S. 214, 223 (1988) (quoting *Anderson v. City of Bessemer City*).

The Fifth Circuit appears to base its de novo review of the facts on its conclusion that the district court did not make adequate fact findings. App. A at A-7.[8] Even if the Fifth Circuit found the district court's findings to be an inadequate basis for review on mandamus, engaging in de novo fact finding is still not justified. It is not the function of appellate courts to engage in primary fact finding. *Pullman-Standard, Div. of Pullman, Inc. v. Swint*, 456 U.S. 273, 291-93 (1982). Instead, the Fifth Circuit should have remanded the case to the district court to make fact findings that would have enabled it properly to review the district court's rulings. *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 714 (1986) (reversing the court of appeals because it had usurped the fact finding role of the trial court). As this Court explained in *Icicle Seafoods*:

> If the Court of Appeals believed that the District Court had failed to make findings of fact essential to a proper resolution of the legal question, it should have remanded to the District Court to make those findings. If it was of the view that the findings of the District Court were "clearly erroneous" within the meaning of Rule 52(a), it could have set them aside on that basis. If it believed that the District Court's factual findings were unassailable, but that the proper rule of law was misapplied to those findings, it could have reversed

---

[8] The district court stressed that it believed that the motions were filed for tactical reasons, and thus "although the Court has considered all the material offered and has engaged in substantial deliberations, it has taken the liberty of reducing its explanation to a more summary form." App. B at B-4 n.2. In view of the trial court's heavy docket, it is certainly not remarkable that it decided, in the absence of request or objection by any party, not to make detailed findings.

> the District Court's judgment. But it should not simply have made factual findings on its own.

Id. at 714. Indeed, remanding to the district court is precisely what the Fifth Circuit has done in other disqualification cases. *See, e.g., Duncan v. Merrill Lynch, Pierce, Fenner & Smith*, 646 F.2d 1020, 1033 (5th Cir. Unit B) (remanding a disqualification case for the district court to make detailed findings of fact and correctly allocate the burden of proof), *cert. denied*, 454 U.S. 895 (1981); *Wilson P. Abraham Constr. Corp. v. Armco Steel Corp.*, 559 F.2d 250, 253 (5th Cir. 1977) (vacating order denying disqualification and remanding for formal findings of fact and conclusions of law).

As other courts have recognized, mandamus is simply not the appropriate vehicle to review fact-intensive determinations by district courts such as the determinations of the district court in this case. *Compare In re Mechem*, 880 F.2d 872, 873-75 (6th Cir. 1989) (rejecting the use of mandamus as a means to challenge an order disqualifying counsel when the district court's order turned on the particular facts of the case) *with In re American Cable Publications, Inc.*, 768 F.2d 1194, 1195 (10th Cir. 1985) (mandamus appropriate because "[t]his is not the ordinary lawyer disqualification case in which the outcome turns on fact findings regarding the lawyer's conduct in the case").

> Disqualification is almost never cut-and-dried; rather, as the Court has recognized, the "decision whether to disqualify an attorney ordinarily turns on the peculiar factual situation of the case then at hand . . . ." *Risjord*, 449 U.S. at 377. Because the district judge is on the front lines, with the smoke of battle pungent in his nostrils, he must be given considerable latitude in matching a condign sanction to counsel's breach of obligation.

In re Bushkin Assocs., 864 F.2d 241, 246 (1st Cir. 1989).

By denying the district court's findings any deference, the Fifth Circuit provides further incentive and increased opportunity for litigants to seek mandamus review. Unless this Court grants certiorari to review the Fifth Circuit's opinion, lawyers and their clients will feel free to seek de novo review of disqualification rulings through the vehicle of mandamus, even though the rulings are based on disputed facts. This use of the writ of mandamus makes a nullity of this Court's requirement that mandamus review might be available to review a district court's ruling on a disqualification motion only "in the exceptional circumstances for which [the writ] was designed." *Firestone*, 449 U.S. at 378 n.13; *Richardson-Merrell*, 472 U.S. at 435.

III. The Fifth Circuit's Decision Creates A New And Unworkable Duty Of Loyalty To Former Clients As The Federal Standard For Disqualification In Former-Client Cases, In Conflict With Established Norms Governing Former-Client Conflicts In The Federal Courts.

The Fifth Circuit's decision makes clear that the ethical standards governing attorney-disqualification motions in federal courts are defined by federal law. App. A at A-9 to A-10; *see, e.g., In re Snyder*, 472 U.S. 634, 635 n.6 (1985); *In re Finkelstein*, 901 F.2d 1560, 1564 (11th Cir. 1990); *United States v. Miller*, 624 F.2d 1198, 1200 (3d Cir. 1980). The proper standard to be applied in attorney-disqualification cases in federal courts is an important question of federal law that has not been, but should be, addressed by this Court.

The Fifth Circuit has created a novel and dangerous basis for finding conflicts of interest in cases involving attorneys representing a party adverse to a former client: a duty of loyalty divorced from the concept of protection of client confidences. The Fifth Circuit's

approach to attorney disqualification in this context conflicts with the law of other circuits and disregards the entire evolution of disqualification law over the last four decades. This broad and amorphous disqualification standard will inevitably promote the tactical abuse of disqualification motions expressly disapproved by this Court while simultaneously usurping the role of the respective state and federal grievance bodies in disciplining the members of their bars.

For purposes of disqualification analysis, courts have long distinguished the representation of interests adverse to a *former* client from the representation of interests adverse to a *current* client. In the current-client context, the broad ethical prohibition has historically been grounded on a lawyer's duty of undivided loyalty to the current client. *See, e.g., Cinema 5, Ltd. v. Cinerama, Inc.*, 528 F.2d 1384, 1386 (2d Cir. 1976). *See generally* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 7.3.2 (1986). Thus, in the absence of client consent, a lawyer is precluded from representing interests adverse to a current client, even if there is no danger that the lawyer could use client confidences against the client in the case in which disqualification is sought. *Cinema 5*, 528 F.2d at 1386.

In the case of former clients, on the other hand, the scope of disqualification is narrower, and courts have inquired whether the current matter is substantially related to a matter in which the attorney represented the former client. *See T.C. Theatre Corp. v. Warner Bros. Pictures*, 113 F. Supp. 265 (S.D.N.Y. 1953). Under this standard, the concern is whether there is a genuine threat that the challenged attorney might betray the confidences of the former client. *See Duncan v. Merrill Lynch*, 646 F.2d at 1028; *Laker Airways Ltd. v. Pan American World Airways*, 103 F.R.D. 22, 38 (D.D.C. 1984) (also noting

that existence of substantial relationship is a question of fact).[9] The concept of loyalty is relevant to the analysis only in the sense that a lawyer has a qualified obligation to maintain the confidences of former as well as current clients.[10] This has been expressed recently in section 213 of the RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS (Tent. Draft No. 4, 1991). Section 213 focuses exclusively on confidentiality interests as a basis for disqualification and the substantial relationship test. Comment b to section 213 points out one of the dangers of overly broad former-client conflict law: "a rule that would transform each retainer into a lifetime commitment of *loyalty* would make lawyers reluctant to take new, relatively modest matters." *Id.* (emphasis added). That applies with particular force in specialties such as antitrust and in small communities with a

---

[9] Indeed, the substantial-relationship test is both grounded upon and a reflection of concerns about the protection of former client confidences: the test permits the party seeking disqualification to establish the existence of a genuine threat that confidences might be disclosed by pointing to the relationship between the current and former matters, rather than by revealing those very confidences that movant seeks to protect. *See, e.g., Duncan*, 646 F.2d at 1032. Of course, a movant can alternatively support a motion to disqualify by offering proof that the challenged counsel actually possesses disqualifying confidential information. *Id.*

[10] Special situations, not germane to this case, exist in which a duty of loyalty (other than a duty to protect confidential client information) may remain relevant in former-client conflict analysis. Thus, a duty founded on loyalty may be relevant in situations in which a threat exists that a former client's trust in a former lawyer was exploited by the lawyer in later commercial dealings or in which the former client's representation was purposefully manipulated in order to gain advantage for a subsequent client. *See* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 7.4.2(b) (1986). More broadly, the present client may require protection because of concern that the lawyer's sense of loyalty to the former client will distort the lawyer's representation of the present client. *See id.* at 362.

relatively limited number of lawyers. Reflecting sensitivity to such concerns, the evolution of the substantial-relationship test in the federal and state courts reflects judicial efforts to tighten and clarify the test, so as to avoid unnecessary disqualification of counsel based upon, for instance, a mere superficial resemblance between the current and former representation. *See, e.g., Duncan*, 646 F.2d at 1029; *Laker*, 103 F.R.D. at 40. The salience of confidentiality and the general irrelevance of loyalty is illustrated most obviously by the rule--accepted everywhere save in this one case--that a lawyer may file suit against a former client (as long as on a matter not substantially related to the former representation). *See, e.g.*, CHARLES W. WOLFRAM, MODERN LEGAL ETHICS, § 7.4.1, at 358-59 (1986).

In its opinion, the Fifth Circuit detaches the concept of loyalty from the protection of client confidences and establishes it as coequal with the confidentiality basis of the substantial-relationship test. App. A at A-25 to A-32. In so doing, the Fifth Circuit has turned four decades of judicial learning on its head. The Fifth Circuit squarely rejected the approach taken in a long line of cases in the Second Circuit, holding that attorney-disqualification motions should not be granted unless the questioned behavior threatens to "taint" the underlying trial. App. A at A-10 to A-13; *see Armstrong v. McAlpin*, 625 F.2d 433, 445-46 (2d Cir. 1980), *vacated*, 449 U.S. 1106 (1981); *Board of Educ. v. Nyquist*, 590 F.2d 1241, 1246 (2d Cir. 1979); *W.T. Grant Co. v. Haines*, 531 F.2d 671, 677 (2d Cir. 1976). The approach of the Second Circuit, which has been widely followed by other

courts,[11] does not disregard or discount ethical concerns. Rather, it reflects the sound judicial recognition that disciplinary bodies, constituted solely to address allegations of attorney misconduct, are the appropriate bodies to deal with alleged attorney misconduct that does not threaten the fairness of adjudicatory proceedings, and that it would be both unnecessary and excessively harsh to deprive an innocent client of his or her chosen advocate when counsel's continued role will not threaten to unfairly taint the proceedings.[12]

One of the many merits of the substantial-relationship standard is that it permits a measure of predictability and certainty in detecting and assessing former-client conflicts because of the connections between former and subsequent representations. The new "disloyalty" rationale announced in this case is dangerous and

---

[11] *See Fiandaca v. Cunningham*, 827 F.2d 825, 831 (1st Cir. 1987); *Koller v. Richardson-Merrell*, 737 F.2d 1038, 1055-56 (D.C. Cir. 1984), *vacated on other grounds*, 472 U.S. 424 (1985); *Ah Ju Steel Co., Ltd. v. Armco, Inc.*, 680 F.2d 751 (C.C.P.A. 1982); *Kitchen v. Arntech Chemical*, 769 F. Supp. 254, 258-59 (S.D. Ohio 1991); *Professional Servs. Indus. v. Kimbrell*, 758 F. Supp. 676, 680 (D. Kan. 1991); *University Patents, Inc. v. Kligman*, 737 F. Supp. 325, 329 (E.D. Pa. 1990); *In re Korea Shipping Co.*, 621 F. Supp. 164, 170 (D. Alaska 1985); *In re Asbestos Cases*, 514 F. Supp. 914, 922 (E.D. Va. 1981); *Meat Price Investigators v. Iowa Beef Processors, Inc.*, 448 F. Supp. 1, 3 (S.D. Iowa 1977), *aff'd*, 572 F.2d 163 (8th Cir. 1978). The Second Circuit approach has also been followed by several states. *See, e.g., Chambers v. Superior Court*, 175 Cal. Rptr. 575, 581 (Cal. Ct. App. 1981); *Reese v. Georgia Power Co.*, 381 S.E.2d 110, 112 (Ga. Ct. App. 1989). *See also Richardson-Merrell*, 472 U.S. at 441 (court need not "continue to permit an individual to be represented by an attorney who by his misconduct in open court has threatened the integrity of the proceedings.") (Brennan, J., concurring).

[12] The Fifth Circuit's statement that disqualification would be appropriate in this case even under the "taint" standard, App. A at A-33, is but another example of the panel's de novo fact finding.

inappropriate as a basis for disqualification in former-client cases because it is entirely unpredictable. It creates unnecessary and vast potential for expansion of disqualification motions (with corresponding de novo appellate review), while simultaneously injecting great uncertainty and unpredictability into disqualification law involving former clients.

There is no question that the rules governing lawyers in disciplinary matters should be enforced vigorously and fairly. But it is a great mistake to order disqualification when there is no legitimate threat to a former client's confidential information. Unlike disciplinary proceedings, in litigation the charges are leveled by an advocate for a private litigant who may be following an entirely private and perhaps peevish agenda, with no interest in the public-impact aspects of professional discipline. *Woods v. Covington County Bank*, 537 F.2d 804, 812-13, 819 (5th Cir. 1976). The Fifth Circuit's belief that "today there is less reason to suspect tactical motivations behind disqualification motions," App. A at A-12 is unwarranted. Indeed, the district court in this case expressly found that "*rarely has a court been presented with a more blatant example of the use of disqualification motions for tactical purposes.*" App. B at B-6. (emphasis in original). This Court itself has expressed its concern about the "tactical use of disqualification motions" to harass opposing counsel. *Richardson-Merrell*, 472 U.S. at 436. Delay, increased cost, and deprivation of an opponent's choice of counsel are, unfortunately, common goals of these motions. The Fifth Circuit's expansive approach to policing the legal profession greatly encourages these tactics. Combined with the Fifth Circuit's unprecedented standard for mandamus jurisdiction, tactical abuse of disqualification motions will certainly become more commonplace.

CONCLUSION

This Court should grant certiorari in this case to make clear that the *Firestone* rule applies when immediate review of orders on attorney-disqualification motions is sought by mandamus as well as by appeal, and limit the availability of mandamus jurisdiction in attorney-disqualification cases. The Fifth Circuit's decision encourages every party disappointed with a district court's disqualification ruling to interrupt the proceedings in the district court to seek mandamus review in the court of appeals. The Fifth Circuit's decision also authorizes appellate courts to make de novo factual findings, instead of reserving the issuance of the writ for cases in which the district court clearly and indisputably abused its discretion. The Fifth Circuit's newly-created federal duty of loyalty to former clients, not limited by the goal of protecting client confidences, is an unworkable and unsupported standard for determining attorney disqualification. The importance of these issues extends well beyond the facts of this dispute, for the outcome here extends the availability of mandamus jurisdiction, broadens the scope of review on mandamus, will deprive clients of their choice of counsel, and encourages former clients to use disqualification motions as a tactical device. For these reasons, the Court should exercise its discretion to grant a writ of certiorari.

Respectfully submitted,

CHARLES ALAN WRIGHT
Counsel of Record
727 East 26th Street
Austin, Texas 78705
(512) 471-3292

CHARLES W. WOLFRAM
Cornell Law School
106 Myron Taylor Hall
Ithaca, New York 14853
(607) 255-9668

HARRY M. REASONER
JOHN L. MURCHISON, JR.
MARGARET C. LING
EDWARD A. CARR
VINSON & ELKINS L.L.P.
1001 Fannin Street, Suite 2500
Houston, Texas 77002-6760
(713) 758-2358

JOHN F. SUTTON, JR.
P.O. Box 49700
Austin, Texas 78765
(512) 471-3293

W. JAMES KRONZER
1900 Memorial Drive
Houston, Texas 77007
(713) 862-5821

Counsel for Petitioner
Northwest Airlines, Inc.

December 3, 1992